No. 360

In the Supreme Court of the United States

OCTOBER TERM, 1957

MAY SEED AND NURSERY COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
LEE A. JACKSON,
HARRY MARSELLI,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	4
Conclusion	7
Appendix A	9
Appendix B	15

CITATIONS

Cases:	
A. Teichert & Son v. *Commissioner*, 18 T. C. 785	4
Angelus Milling Co. v. *Commissioner*, 325 U. S. 293	6
Barry-Wehmiller Machinery Co. v. *Commissioner*, 20 T. C. 705	4
Blum Folding Paper Box Co. v. *Commissioner*, 4 T. C. 795	4
H. Fendrich, Inc. v. *Commissioner*, 242 F. 2d 803	7
Lockhart Creamery v. *Commissioner*, 17 T. C. 1123	4
Packer Publishing Co. v. *Commissioner*, 17 T. C. 882	4
Packer Pub. Co. v. *Commissioner*, 211 F. 2d 612	4, 6
St. Louis Amusement Co. v. *Commissioner*, 22 T. C. 522	4
Utility Appliance Corp. v. *Commissioner*, 26 T. C. 366	4
Wiener Machinery Co. v. *Commissioner*, 16 T. C. 48	4
Statutes:	
Act of December 17, 1943, c. 346, 57 Stat. 601	6
Internal Revenue Code of 1939:	
Sec. 322 (b) (26 U. S. C. 1952 ed., Sec. 322 (b))	7
Sec. 710 (26 U. S. C. 1952 ed., Sec. 710)	2, 5, 9
Sec. 722 (26 U. S. C. 1952 ed., Sec. 722)	2, 4, 5, 6, 7, 11
Sec. 732 (d) (26 U. S. C. 1952 ed., Sec. 732)	3
Miscellaneous:	
T. D. 5393, 1944 Cum. Bull. 415	6, 12
T. D. 5483, 1945 Cum. Bull. 277	12
T. D. 5530, 1946—2 Cum. Bull. 104	12
Treasury Regulations 109, Sec. 30.722–5	2, 4, 7, 12

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 360

MAY SEED AND NURSERY COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Appendix B, *infra*, pp. 15–18) is reported at 24 T. C. 1131. The opinion of the Court of Appeals (Pet. A1–A9) is reported at 242 F. 2d 151.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1957. (R. A1.) A petition for rehearing was denied on April 15, 1957. (Pet. 1.) Upon application by the taxpayer, an order was entered by Mr. Chief Justice Warren on July 10, 1957, extending to August 15, 1957, the time within which a petition for a writ of certiorari might be filed. The petition was filed on August 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether, in the computation of its excess profits tax liability for 1942, the taxpayer was entitled to carry over to that year an unused excess profits credit from 1941 resulting from a "constructive average base period net income" established as relief under Section 722 of the Internal Revenue Code of 1939, where the carry-over had not been specifically requested in the application for relief under Section 722, as required by the regulations.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of Sections 710 and 722 of the Internal Revenue Code of 1939,[1] and of Section 30.722–5 of Treasury Regulations 109, are set forth in Appendix A, *infra*, pp. 9–14.

STATEMENT

The pertinent facts, as recited in the opinions of the Tax Court (Appendix B, *infra*, pp. 15–18) and the Court of Appeals (Pet. A1–A9), may be summarized as follows:

The taxpayer in 1943 filed its excess profits tax return for its fiscal year ended June 30, 1942. Thereafter, the period for assessment of deficiencies for that year was extended until June 30, 1947.

In 1943, the taxpayer filed applications for relief under Section 722 with respect to its fiscal years 1942 and 1943. In the application for 1942, it claimed a constructive average base period net income in an amount ($187,871.38) greater than its excess profits

[1] All Code references herein are to the 1939 Internal Revenue Code.

net income for that year, and hence it did not claim the benefit of an unused excess profits credit carry-over to that year based upon a constructive average base period net income from 1941. It did claim such carry-over in its application in respect to 1943.

After numerous intervening conferences and examinations of its books, the taxpayer in 1952 agreed to a constructive average base period net income in the amount of $96,900 for its fiscal years 1942 through 1946, and in the amount of $58,200[2] for 1941 "for carry-over purposes."

In his subsequent determination of the taxpayer's excess profits tax liability, and in his formal notice of the allowance in part, and disallowance in part, of the taxpayer's claim for Section 722 relief for 1942, the Commissioner refused to allow to the taxpayer an unused excess profits carry-over from 1941 to 1942 based upon a constructive average base period net income under Section 722.[3]

The Tax Court, in an opinion which was reviewed by its "Special Division",[4] upheld the Commissioner's action. (Appendix B, *infra*, pp. 15–18.) The Court of Appeals affirmed. (Pet. A1–A9.)

---

[2] This figure was erroneously printed as $68,200 at R. 81.

[3] In a statement accompanying his notice, the Commissioner explained his refusal as follows (R. 9):

"The deduction of an unused excess profits credit carry-over, based on a constructive average base period net income determined by the Excess Profits Tax Council, from the taxable year ended June 30, 1941, to the year ended June 30, 1942, is not allowable for the reason that no claim for such credit carry-over was made on the application for relief filed for the year ended June 30, 1942."

[4] Pursuant to the provisions of Section 732 (d) of the Internal Revenue Code of 1939.

ARGUMENT

1. The courts below have correctly upheld the Commissioner's refusal to allow the taxpayer, in the determination of its excess profits tax liability for 1942, the carry-over to that year of an unused excess profits credit resulting from a constructive average base period net income under Section 722 of the Code (Appendix A, *infra,* pp. 11–12) for 1941, because such carry-over had not been specifically requested in any timely application for relief or timely amendment thereto, as required by the Regulations, Section 30.722–5 (a) of Treasury Regulations 109 (Appendix A, *infra,* pp. 12–13). In so doing, the courts below have correctly sustained the Regulations and their application to the facts of this case.

2. The decision below is consistent with all cases which have considered the problem as to the allowance of an unused excess profits credit carry-over (or carry-back) resulting from the grant of relief under Section 722, where such credit has not been expressly claimed in a timely application. *Lockhart Creamery* v. *Commissioner,* 17 T. C. 1123, 1140–1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner,* 20 T. C. 705; *St. Louis Amusement Co.* v. *Commissioner,* 22 T. C. 522; and *Utility Appliance Corp.* v. *Commissioner,* 26 T. C. 366, pending on review in the Ninth Circuit. Cf. *Packer Publishing Co.* v. *Commissioner,* 17 T. C. 882, 898, reversed on other issues, 211 F. 2d 612 (C. A. 8th). See also, *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795, 796–797, 799.

Cases such as *Wiener Machinery Co.* v. *Commissioner,* 16 T. C. 48 (or *A. Teichert & Son* v. *Com-*

missioner, 18 T. C. 785), are not, as suggested (Pet. 4–6), at variance with the instant case, for, as the Court of Appeals properly pointed out (Pet. A5), Section 722 relief was not involved there.

3. The basic fallacy of the taxpayer's position—and of reasons 1, 2, and 3 urged (Pet. 4) for the granting of the writ—is its attempt to disregard entirely the fact that the carry-over credit it seeks in the instant case is one resulting from the grant of Section 722 relief. Thus, the taxpayer endeavors to view the matter as cast solely upon the *general* carry-over (and carry-back) provisions of Section 710 (c) (Appendix A, *infra,* pp. 10–11)—which provisions, it asserts (Pet. 4, 6–7), are clear, unambiguous and mandatory. But, as the Court of Appeals aptly stated (Pet. A5–A6), whatever "automaticness of right" there may be under Section 710 to take unused credits into account, that relates only to credits resulting under the normal provisions of the excess profits tax law and not to those arising as the result of a grant of relief under Section 722.

Undeniably, the unused credit sought to be utilized in this case is one arising only because of the grant of Section 722 relief. Therefore, the appropriateness and reasonableness of the Regulations must be viewed in the light of, not Section 710, but Section 722—and Section 722 (d) contains express congressional authority for the promulgation of regulations with respect to the filing of applications for relief under Section 722.

Contrary to the taxpayer's assertion (Pet. 9) that "there was no room for the operation of a depart-

mental regulation", the Court of Appeals was correct in holding (Pet. A4, A6) that, in view of the problems presented by Section 722, the Commissioner was fully warranted in adopting the challenged regulation "for administrative facilitation in the complex field involved" (Pet. A6). A mere reading of the relief provisions of Section 722 makes it readily understandable that Congress would choose to leave to the Commissioner the details for the administration of a matter as complicated as Section 722. See *Packer Pub. Co.* v. *Commissioner*, 211 F. 2d 612, 615 (C. A. 8th). Cf. *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 296.

4. The suggestion (Pet. 4) that there was any improper retroactive application of the regulation in this case was correctly rejected by the Court of Appeals (Pet. A7–A8). The charge of retroactivity stems from the fact that the taxpayer had filed its application for relief on September 15, 1943, while the pertinent amendment to the regulation was not adopted until 1944. (T. D. 5393, 1944 Cum. Bull. 415, amending Section 30.722–5 (a) of Treasury Regulations 109.) After the taxpayer had filed its application for relief, the controlling statute (Section 722 (d)) was finally amended by the Act of December 17, 1943, c. 346, 57 Stat. 601 (retroactively, so as to apply to all taxable years beginning after 1939), so as to require the filing of claims or applications for relief pursuant to regulations to be promulgated by the Commissioner, and extending the time for such claims to the same period as that prescribed by Section 322—in gen-

eral, three years after the filing of the return, or two years after the payment of the tax, whichever expires later. By the consents which had been executed, the statutory period as to 1942 had been extended to June 30, 1947, and thus the period for the filing of claims would not expire until six months thereafter (Section 322 (b) (3))—or until the end of 1947. Therefore, after the challenged regulation was amended in 1944, the taxpayer had over three and one-half years within which it could have made claim for the carry-over of the unused credit under Section 722, by an amendment to its application—and the Regulations expressly authorized the filing of amendments or supplemental applications for relief for such purposes (Section 30.722-5 (a) of Treasury Regulations 109).

5. Finally, there is no conflict, as urged (Pet. 4, 5–6, 9–10), with *H. Fendrich, Inc.* v. *Commissioner*, 242 F. 2d 803 (C. A. 7th). That case in no way involved the Section 722 regulation which is challenged here. Further, that case, unlike the instant case, involved a so-called "standard issue" (i. e., an issue as to other than relief under Section 722), and the Seventh Circuit merely held that, after a timely application for relief under Section 722 has been filed with the Commissioner, the ordinary statute of limitations does not operate to bar the refund of an overpayment resulting from a "standard issue"—a matter entirely unrelated to what was decided below in this case.

CONCLUSION

The decision below is unquestionably correct. The excess profits tax provisions here involved were re-

pealed in 1945. There is no conflict of decisions, and no question calling for review by this Court is presented. The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HARRY MARSELLI,
Attorneys.

SEPTEMBER, 1957.

APPENDIX A

Internal Revenue Code of 1939:

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

Subchapter E—Excess Profits Tax

[As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"].

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Section 201 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 202 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

* * * * *

(b) [as amended by Section 2 (a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by Section 204 (a) of the Revenue Act of 1942, *supra*] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific exemption.*—A specific exemption of $5,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as amended by Section 204 (b) of the Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—* * *

(B) *Unused Excess Profits Credit Carry-Over.*—If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the intervening taxable year computed for such intervening taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit or to any unused excess profits credit carry-back, and (ii) with-

out the deduction of the specific exemption provided in subsection (b) (1). * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

* * * * *

SEC. 722 [as amended by Section 222 of the Revenue Act of 1942, *supra*, and the Act of December 17, 1943, c. 346, 57 Stat. 601].

GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722 (b) (4) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. 1952 ed., Sec. 722.)

Treasury Regulations 109, promulgated under the Internal Revenue Code of 1939:

Sec. 30.722–5 [as added by T. D. 5045, 1941–1 Cum. Bull. 69, and as amended by T. D. 5264, 1943 Cum. Bull. 761, and T. D. 5393, 1944 Cum. Bull. 415[1]]. *Application for Relief Under Section 722.—(a) Requirements* * * *.

* * * * *

---

[1] This section of the Regulations was further amended by T. D. 5483, 1945 Cum. Bull. 277, in respects not here material, effective January 5, 1946, according to T. D. 5530, 1946-2 Cum. Bull. 104.

Similar changes were made by T. D. 5393, *supra* (and T. D. 5483, *supra*) to Treasury Regulations 112, the excess profits tax regulations applicable to taxable years beginning after December 31, 1941

If an unused excess profits credit for any taxable year for which an application for relief on the appropriate Form 991 has not been filed, computed on the basis of a constructive average base period net income, is to be used as an unused excess profits credit carry-over or carry-back, the taxpayer must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. The application in such case must be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an application on the appropriate Form 991 for the benefits of section 722 has been filed with respect to a taxable year, or if the filing of such application is unnecessary under (*d*) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 991 (revised January, 1943), or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied.

* * * * *

(*d*) *Waiver of limitations for subsequent taxable years.*—The taxpayer shall file an ap-

plication for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. However, if a constructive average base period net income has been finally determined under section 722 (a) with respect to the taxpayer or if permission is granted by the Commissioner after a determination which has not become final, such taxpayer may use the constructive average base period net income so determined, except as further adjustments may be required by section 711 (b), in computing its excess profits credit based on income, its adjusted excess profits net income, and its excess profits tax in any return required to be filed thereafter. * * *

* * * * *

APPENDIX B

The Tax Court of the United States

MAY SEED AND NURSERY COMPANY, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 50073. Filed September 29, 1955.

In 1943 petitioner filed an application for relief under section 722 of the Internal Revenue Code of 1939 in respect of its fiscal year 1942, in which it did not claim a carry-over of an unused excess profits credit from its fiscal year 1941 based on a constructive average base period net income. *Held*, petitioner's right to the carry-over is conditioned upon the making of such claim. *Lockhart Creamery*, 17 T. C. 1123, followed.

Denver A. Busby, C. P. A., for the petitioner.
Julian L. Berman, Esq., for the respondent.

The respondent, in respect of the fiscal year of the petitioner ended June 30, 1942, determined a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69. In making the determination respondent refused to allow an unused excess profits credit carry-over based on a constructive average base period net income from the fiscal year 1941 in the amount of $18,487.12. As a result of such disallowance, the overassessment of excess profits taxes determined by the respondent was $7,181.79 less than the amount claimed by the petitioner, and petitioner's income tax liability was reduced in the amount of $2,226.35. The net amount in controversy is thus $4,955.44. The sole issue for determination is whether respondent erred in refusing to allow petitioner the benefit of the unused excess profits credit carry-over from its fiscal year

1941 to its fiscal year 1942, based on petitioner's constructive average base period net income.

FINDINGS OF FACT.

A stipulation of facts filed by the parties is hereby incorporated by this reference as a part of our findings.

Petitioner is a corporation organized January 1, 1919, under the laws of the State of Iowa. It has its principal office at Shenandoah, Iowa where it is engaged in the farm seed and supply business. Its return for the fiscal year ended June 30, 1942, was filed with the collector of internal revenue for the district of Iowa, at Des Moines, Iowa.

Petitioner filed a tentative excess profits tax return for its fiscal year 1942 on September 15, 1942, having previously been granted an extension of time to file its excess profits tax return for that year until October 15, 1942. The excess profits tax return for the fiscal year 1942 was then filed on October 15, 1942. By duly executed consents, the period within which the respondent could assess any deficiencies in income tax, excess profits tax, or war profits tax was extended until June 30, 1947.

On September 15, 1943, petitioner filed on Forms 991 applications for relief under section 722 of the Internal Revenue Code of 1939 in respect of its fiscal years 1942 and 1943. In the application in respect of its fiscal year 1942, petitioner claimed a constructive average base period net income of $187,871.38. This amount exceeded petitioner's excess profits tax net income for that year, and it did not claim the benefit of an unused excess profits credit carry-over for that year based on a constructive average base period net income from its fiscal year 1941. How-

ever, in its application in respect of the fiscal year 1943 it did claim such carry-over.

From September 15, 1943, to the end of 1951, numerous examinations were made of petitioner's books and records and a number of conferences held. During that period no constructive average base period net income was allowed, and no request was made that petitioner furnish a computation of any unused excess profits credit for its fiscal year 1941. On April 3, 1952, petitioner agreed to a constructive average base period net income as determined by the Excess Profits Tax Council. The constructive average base period net income so determined was approved by the Coordinator, Excess Profits Tax Council, on June 16, 1952, and was as follows:

Fiscal year ended June 30	*Amount of constructive average base period net income*
1941 (for carry-over purposes)	$58,200
1942	96,900
1943	96,900
1944	96,000
1945	96,900
1946	96,900

The respondent determined, for the fiscal year ending June 30, 1942, a deficiency in income tax in the amount of $9,730.18 and an overassessment in excess profits tax in the amount of $31,387.69, resulting from the partial allowance of the claim for relief under section 722 of the Internal Revenue Code of 1939. In determining the overassessment in excess profits tax for the fiscal year 1942 respondent did not allow to the petitioner the benefit of an unused excess profits credit carry-over from its fiscal year 1941 based on a constructive average base period net income. Respondent gave as his reason the fact that no claim therefor had been made as required by the regulations in the application filed by petitioner with respect to its fiscal year 1942. It is this refusal on the

part of the respondent which petitioner challenges and which raises the issues to be hereinafter met.

OPINION.

RAUM, *Judge:* Petitioner seeks the benefit of an unused excess profits credit carry-over based on a constructive average base period net income from its fiscal year 1941 to its fiscal year 1942, notwithstanding that it made no claim for such carry-over in its application for relief which it filed with respect to 1942. This issue is foreclosed by the decision of this Court in *Lockhart Creamery,* 17 T. C. 1123, 1140–1143. Cf. *St. Louis Amusement Co.,* 22 T. C. 522; *Barry-Wehmiller Machinery Co.,* 20 T. C. 705.

Reviewed by the Special Division.

Decision will be entered for the respondent.